Supreme Court, U.S.
FILED
JAN 23 2009
OFFICE OF THE CLERK

No. 08 946

In The

Supreme Court of the United States

RONALD J. GIANELLI,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal restitution order is a "punishment" which implicates the *ex post facto* Clause of the United States Constitution?

2. Whether the *ex post facto* Clause of the United States Constitution permits the enforcement of a criminal restitution order which has been previously time-barred by the statutes in effect at the time of the offense?

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CITATION OF OPINIONS BELOW

The Ninth Circuit Court of Appeals selected the opinion subject to this petition for publication in the Federal Reporter. The decision is reported at 543 F.3d 1178 (9th Cir. 2008). The decision replaced the previously reported decision in the same cause reported at 519 F.3d 962 (9th Cir. 2008).

JURISDICTION

The Ninth Circuit Court of Appeals entered its original decision on March 20, 2008. On September 17, 2008, the Court granted rehearing, withdrew its decision and replaced it with a new published decision. The order granting rehearing, withdrawing the old decision and filing a new decision recited that "The parties are not precluded from filing further petitions for rehearing." Gianelli petitioned for rehearing of the new September 17 decision. On October 31, 2008, the Ninth Circuit entered its Order denying the petition for rehearing and rehearing *en banc*.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit's decision on a writ of certiorari.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

ARTICLE I, SECTION 9.3

No bill of attainder or *ex post facto* law shall be passed.

United States Code

18 USC CHAPTER 228

(Federal Restitution Statute at Time of Offense)

Section 3579(h) The order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

28 USC CHAPTER 176
("Federal Debt Procedures Collection Act")
Enacted Seven Years After the Offense

Section 3001(b) To the extent that another Federal law specifies procedures for recovering on a claim or a judgment for a debt arising under such law, those procedures shall apply to such claim or judgment to the extent those procedures are inconsistent with this chapter.

Section 3003(d) This chapter shall preempt State law to the extent such law is inconsistent with a provision of this chapter.

Section 3003(f) Except as provided otherwise in this chapter, the Federal Rules of Civil Procedure shall apply with respect to actions and proceedings under this chapter.

Federal Rules of Civil Procedure

Rule 69(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the states in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent it is applicable.

California Code of Civil Procedure

Section 683.020 When Judgment Becomes Unenforceable

Except as otherwise provided by statute, upon expiration of 10 years after the date of entry of a money judgment or a judgment for possession or sale of real property:

(a) The judgment shall not be enforced.

(b) All enforcement procedures pursuant to judgment or to the order issued pursuant of the judgment shall cease.

(c) Any lien created by the enforcement procedure pursuant to judgment shall be extinguished.

STATEMENT OF FACTS

In March, 2000, appellant Ronald J. Gianelli was informed by his cousin that a notice of sale had been posted on his property in Tuolumne County. E.R.II, 227-229 The notice was for an execution sale to satisfy the balance of a restitution order which had been entered in 1987 in connection with Gianelli's conviction of one count of mail fraud. E.R.II, 243-244 The date of the crime of which he was convicted was May 25, 1983 – some 25 years ago. E.R.II, 252, E.R.I, 26-27

Gianelli had served the term of imprisonment and was released from probation on November 12, 1991. In the intervening 17 years, he had no further trouble with the law. 10/17/91 letter of Probation Office to Court (filed under seal). E.R.II, 227-229

Appellant objected to the writ of execution on the family property on the ground that the restitution order was subject to Fed.R.Civ.P. 69(a) which provides that enforcement by execution of a federal judgment is governed by the law of the state where the District Court sits. The applicable law in California limited the time for execution to ten years from entry. E.R.II, 230-242 On October 4, 2000, the Hon. Spencer Williams quashed the writ on the ground that the

Government had violated its written repayment agreement to not execute as long as Gianelli made certain monthly payments. E.R.II, 37-41 The order to quash found that "Although Defendant may at times have made minor lapses in his payment schedule, his payment history exhibits an honest intention to pay his debt". E.R.II, 40

Thereafter, the Government sought another writ of execution. Gianelli repeated his argument that Fed.R.Civ.P. 69(a) incorporated the 10 year limit on execution contained in California Code of Civil Procedure § 683.020. Therefore, the right to a writ of execution or other collection procedures ended on the tenth anniversary of the non-renewed judgment – May 13, 1997. The District Court, on October 17, 2001 ordered that a writ of execution would be issued unless Gianelli paid an immediate $10,000 and monthly sums of $1,510 thereafter. E.R.I, 12-25

Gianelli appealed the order to the Ninth Circuit and, on February 3, 2003, the Court vacated the order on the ground that its statutory basis was unclear. *United States v. Gianelli,* 55 Fed. App'x, 831, 832 & n. 1 (9th Cir. 2003). The case was remanded to District Court. E.R.II, 17-20

After argument and briefing, the District Court issued a tentative order, on January 25, 2005, that the 1987 restitution was based on the version of the Victim Witness Protection Act (VWPA) in effect at the time of the crime in 1983. The court further found that Fed.R.Civ.P. 69(a) incorporated the 10 year limit

on execution of judgment found in Code of Civil Procedure § 683.020 and that further enforcement of restitution was thus time barred. E.R.II, 167-175 The Court invited further briefing and, while the matter was pending, the Government on December 27, 2004, asserted a lien on Gianelli's residence and collected $80,901.88 from the sales escrow. E.R.II, 1-4 Finally, on May 1, 2007 – four years after the initial Ninth Circuit order – the District Court issued a final order which *reversed* its tentative order and found that the Federal Government as "Sovereign" has the right to enforce its judgment in perpetuity without regard to time limitations imposed by state law. E.R.I, 1-11

Timely appeal was filed. Jurisdiction in the Ninth Circuit Court of Appeals was based on 28 U.S.C. § 1291. After briefing and oral argument, the Court filed its opinion on March 20, 2008. The decision rejected Gianelli's argument that enforcement was barred by Code of Civil Procedure § 683.020. This rejection was based on the rule that the United States, as Sovereign, was not subject to state statutes of limitation. Gianelli timely petitioned for a panel rehearing and rehearing *en Banc* on the ground that the United States Supreme Court had held, in *Custer v. McCutcheon,* 283 U.S. 514 (1931), that state time limits on execution were *not* statutes of limitation and did apply to the United States as litigant.

On May 21, 2008, the panel ordered supplemental briefing on the applicability of the Federal Debt Collection Procedures Act ("FDCPA"). 28 U.S.C. § 3001 *et seq.* After the submission of briefs, the panel

filed an order on September 17, 2008, which granted the rehearing, withdrew the original decision and entered a new opinion which substituted a different rationale for the rejection of Gianelli's Code of Civil Procedure § 683.020 argument. The new opinion abandoned the contention that the Sovereign Federal Government was not subject to state time limits on judgment enforcement. Instead it held that, since the FDCPA had no mention of time limits on enforcement, it was necessarily "inconsistent" and therefore preemptive of state law time limits. Thus, restitution orders are perpetually enforceable. The Court further held that retrospective application of FDCPA to a restitution order for a crime committed prior to the 1990 enactment of the FDCPA did not violate the *ex post facto* prohibition.

The order granting rehearing and substituting the new opinion expressly stated: "The parties are not precluded from filing further petitions for rehearing." On September 29, 2008, Gianelli timely petitioned for rehearing on the ground, among others, that retroactive application of the FDCPA to criminal restitution orders based on pre-FDCPA offenses violates the *ex post facto* prohibitions. On October 31, 2008, the Ninth Circuit denied rehearing and rehearing *en banc*.

ARGUMENT ON QUESTIONS PRESENTED AND REASONS FOR GRANTING THIS PETITION

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE QUESTION OF WHETHER A CRIMINAL RESTITUTION ORDER IS A "PUNISHMENT" SUBJECT TO THE CONSTITUTIONAL *EX POST FACTO* PROHIBITION

In the instant appeal, the Ninth Circuit, in its substituted decision, ruled that the Federal Debt Collection Procedures Act ("FDCPA"), enacted in 1990, could be retroactively applied to the Gianelli restitution order for an offense committed in 1983. The effect was to eliminate the ten year limit on enforcement set forth in California Code of Civil Procedure § 683.020, which was incorporated by Federal Rule of Civil Procedure 69(a) in accord with then existing 18 U.S.C. § 3579(h). The Government first started to use the FDCPA remedy in 1999 – long after the enforceability expired in 1997. Petitioner contends the use of the FDCPA to revive a time barred restitution punishment aggravated the punishment by extending it beyond the period of enforceability in effect at the time of the 1983 offense. This violated the *ex post facto* prohibition.

In determining whether the *ex post facto* prohibition of Article I, § 9.3 applies to retroactive application to changes in criminal restitution laws, the threshold question of whether restitution is "punishment" must be resolved. *Kansas v. Hendricks,* 521 U.S. 346 (1997) [The *ex post facto* prohibition only

applies to "punishments"]. There is a clear division among the Circuits as to whether criminal restitution orders are punishments subject to the *ex post facto* Clause.

The Second, Third, Fifth, Ninth, Eleventh, and District of Columbia Circuits have held that criminal restitution orders are "punishments" and that the *ex post facto* prohibition bars the application of revised restitution statutes to crimes committed prior to the statute's enactment. See *United States v. Thompson*, 113 F.3d 13, 14 n. 1 (2d Cir. 1997); *United States v. Edwards,* 162 F.3d 87, 89-90 (3d Cir. 1998); *United States v. Richards,* 204 F.3d 177, 212-213 (5th Cir. 2000), *cert. denied*, 32 U.S. 826, 121 S.Ct. 73, 148 L.Ed.2d 36 (2000); *United States v. Williams,* 128 F.3d 1239, 1241 (8th Cir. 1997); *United States v. Baggett,* 125 F.3d 1319, 1322 (9th Cir. 1997), *cert. denied*, 522 U.S. 1133, 118 S.Ct. 1089, 140 L.Ed.2d 145 (1998); *United States v. Siegel,* 153 F.3d 1256, 1260 (11th Cir. 1998) and *United States v. Rezaq,* 134 F.3d 1121, 1140 n. 13 (D.C.Cir. 1998), *cert. denied*, 525 U.S. 834, 119 S.Ct. 90, 142 L.Ed.2d 71 (1998).[1]

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[1] In the foregoing cases, the question of whether restitution was "punishment" was raised in the context of efforts to apply the Mandatory Victims Restitution Act of 1986 ("MVRA") to offenses which occurred prior to the law's enactment. The cited cases hold that, because restitution is "punishment", amendments which make the restitution more onerous may not be applied retroactively.

On the other hand, the Seventh and Tenth Circuits have taken a minority position that criminal restitution orders are not punishments which implicate the *ex post facto* Clause. See *United States v. Newman,* 144 F.3d 531, 539 & n. 7 (7th Cir. 1998) and *United States v. Nichols,* 169 F.3d 1255, 1279-1280 (10th Cir. 1999), *cert. denied*, 528 U.S. 934, 120 S.Ct. 336, 145 L.Ed.2d 262 (1999).[2]

This conflict among the Circuits concerning the important question of whether restitution orders are "punishments" subject to the *ex post facto* Clause is a compelling issue which necessitates the Supreme Court's intervention. The question presents an unresolved problem of federal criminal law which requires authoritative settlement. Restitution orders are a common feature of federal sentencing. The frequent revision of these statutes create recurring issues of

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[2] In his Report and Recommendation, the Magistrate Judge in the present case noted, in footnote 4, that: "It is worth noting that Circuit courts are in disagreement about whether restitution should be characterized as "punishment" for the purposes of invoking the *ex post facto* prohibition." E.R.I, 23 See App. 63. The Magistrate criticized the majority view – including that of his own Ninth Circuit – and ruled that retroactive application of the MVRA twenty year limitation on collection, which was enacted after Gianelli's offense, would not offend the *ex post facto* Clause. This recommendation was adopted by Judge Williams and made part of his payment plan order. E.R.I, 12-17 The order was later reinstated by Judge Whyte and are part of the judgment appealed from. E.R.I, 1-11 In its brief in the 2001 appeal, the Government admitted that MVRA could not be retroactively applied to Gianelli. E.R.II, 74

retroactivity and effective date. For these reasons, the *ex post facto* implications of revised restitution collection statutes creates an issue of vital public interest which fully justifies a grant of review pursuant to Supreme Court Rule 10(a).

II. THE COURT SHOULD CLARIFY THE APPLICATION OF ITS RULING IN *STOGNER v. CALIFORNIA* TO THE TIME BARRED ENFORCEMENT OF CRIMINAL RESTITUTION ORDERS

In *Stogner v. California*, 539 U.S. 607 (2003), this Court struck down a California statute which would permit a child sex offense prosecution after expiration of the statute of limitation existing at the time of offense. The majority held that revival of a time barred prosecution violated the *ex post facto* prohibition of Article I, § 10 because it came within the second category of Justice Chase's seminal analysis of the *ex post facto* Clause in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).[3] It found that the retroactive application of the child sex offense law would inflict punishment on a defendant, who, by reason of the previously expired statute of limitation, was legally immune from punishment. The dissenters maintained that there was no reason to make a distinction between extension of unexpired statutes of limitation

[3] "At other times they [Parliament] inflicted punishments, where the party was not, by law, liable to any punishment." 3 U.S. (3 Dall.) at 389, quoted in *Stogner v. California, supra*, 539 U.S. at 612.

for criminal prosecution (which the majority said was permissible) and the revival of prosecutions after the expiration of the limitation.

In the present case, this distinction between expired and unexpired statutes of limitation is not presented. This Court has previously held, in *Custer v. McCutcheon,* 286 U.S. 514 (1931), that a state law time limit on execution of judgment is *not* a statute of limitation.[4] Moreover, in the present case, the 1990 FDCPA did not *extend* the time limit for enforcement; it *eliminated* the limit and thereby made restitution orders perpetually enforceable, despite the fact that Congress, in enacting the current version of the criminal restitution statutes, imposed a 20 year limit on enforcement. 18 U.S.C. § 3664(m)(a)(1) incorporates the 20 year limit for the collection of fines found in 18 U.S.C. § 3613(b). In short, under the Ninth Circuit's decision, the Government may now disregard all statutory time limits on the collection of restitution and fines – which are punishments – provided it acts under the FDCPA. This Court should grant review to resolve this conflict between the Ninth Circuit's expansive interpretation of the FDCPA and time limits on enforcement of restitution and fines mandated by Congress.

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[4] It was because of *Custer v. McCutcheon* that the Ninth Circuit withdrew its previous published decision in this case and substituted a new decision which raised the *ex post facto* issue.

By removing all time limits on enforcement of restitution orders, the FDCPA, as interpreted by the Ninth Circuit, plainly inflicts a greater punishment than that existing at the time of the offense and thereby falls within the third proscribed category[5] described by Justice Chase in *Calder v. Bull,* 3 U.S. (3 Dall.) 386. 1 L.Ed. 648 (1798). Perpetual exposure to the garnishment of earnings, recordation of liens, seizure of assets, disparagement of credit and other enforcement remedies is not a mere "procedural" change. Alteration of collection exposure from a limited time period to an unlimited duration is a significant aggravation of punishment. It is not analogous to changes in the parole review schedule in *California Dep't of Corrections v. Morales,* 514 U.S. 499 (1995), nor is it the same as an increase in the restitution deductions taken from prison wages found in *Quarles v. Kane,* 482 F.3d 1154 (9th Cir. 2007). The overhang of a large unsatisfied debt destroys credit and impairs employability, thereby placing a crushing economic burden on the convict. It is a stigma which prevents rehabilitation and integration into a law-abiding life. Endless exposure to overwhelming debt is a life sentence to financial ruin. The retroactive elimination of temporal limits on this stigma and burden is exactly the kind of "arbitrary and potentially vindictive legislation" that the *ex post facto*

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[5] "[I]n other cases, they inflicted greater punishment than the law annexed to the offense." 3 U.S. (3 Dall.) at 389, quoted in *Stogner v. California, supra*, 539 U.S. at 612.

Clause was intended to prevent. See *Stogner v. California, supra*, 539 U.S. at 611.

CONCLUSION

Ex post facto prohibitions should not be evaded by the application of civil enforcement statutes which have the effect of retroactively enhancing criminal punishments. For reasons stated, the Court should grant review of this case.

Dated: January 23, 2009

Respectfully submitted,

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APPENDIX

Appendix A – Ninth Circuit Opinion Published at 543 F.3d 1178 (9th Cir. 2008), Filed on September 17, 2008 .....App. 1

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. RONALD J. GIANELLI, *Defendant-Appellant.*	No. 07-10233 D.C. No. CR-86-20083-RMW ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
February 12, 2008 – San Francisco, California

Filed September 17, 2008

Before: William C. Canby, Jr., David R. Thompson, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Thompson

COUNSEL

Patrick James Sullivan, Oakland, California, for the defendant-appellant.

Richard A. Friedman, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

ORDER

The appellant Gianelli's Petition for Rehearing is GRANTED. The opinion filed March 20, 2008, and published as *United States v. Gianelli,* 519 F.3d 962 (9th Cir. 2008), is withdrawn. In place of that withdrawn opinion, a new opinion is filed with this Order.

The parties are not precluded from filing further petitions for rehearing.

OPINION

THOMPSON, Senior Circuit Judge:

In May of 1987, Ronald J. Gianelli ("Gianelli") pleaded guilty to one count of mail fraud, 18 U.S.C. § 1341, in the Northern District of California. As part of his sentence he was ordered to pay restitution to the federal government in the amount of $125,000. Gianelli did not appeal that judgment.

Gianelli now appeals a May 2007 district court order reinstating an October 17, 2001 Order Imposing Payment Plan aimed at collecting the remaining amount of restitution owed. Gianelli contends that the government is barred from enforcing the restitution judgment because ten years from the date of that judgment passed on May 13, 1997, and California state law precludes enforcement of a judgment after that period of time. He further argues that the original $125,000 restitution amount was improper because it was not predicated upon the government's

actual loss, as required by *Hughey v. United States*, 495 U.S. 411 (1990).

We have jurisdiction under 28 U.S.C. § 1291. We conclude that Gianelli waived the right to appeal the amount of the restitution order by failing to file a direct appeal, and we affirm the district court's May 1, 2007 order reinstating the October 17, 2001 payment plan.

I. BACKGROUND

An indictment filed on July 31, 1986, in the United States District Court for the Northern District of California charged Gianelli with six counts of mail fraud, conspiracy to defraud the United States, and 17 counts of receiving kickbacks on subcontracts for Defense Department procurement contracts. Gianelli pleaded guilty to one count of mail fraud. The remaining counts were dismissed. He was sentenced on May 13, 1987 to five years of imprisonment, with all but six months suspended, and ordered to pay $125,000 in restitution to the United States. The remaining counts were dismissed.

On October 29, 1991, while Gianelli was on probation, he entered into an agreement with the Probation Office that he would make payments of $100 per month toward the satisfaction of his restitution debt. Gianelli substantially made the payments as agreed. Then, on December 15, 1999, in an attempt to satisfy the outstanding balance of $109,300, the government applied for a writ of execution under the

Federal Debt Collection Procedures Act, 28 U.S.C. § 3203. The government wanted to levy the writ on a house and 52 acres of land belonging to Gianelli. After numerous objections, the district court, by a September 19, 2001 order, adopted the magistrate judge's finding that the United States was "entitled to issuance of the writ," but the court suggested an alternative payment plan by which "in lieu of execution . . . it would be just . . . to allow [Gianelli] to pay his debt in monthly installments, including interest so as to provide the United States with the full value to which it is entitled. . . . "

On September 25, 2001, Gianelli agreed to the installment payment alternative, but expressly reserved his objection to the government's right to collect his restitution obligation. On October 17, 2001, the district court entered the installment payment order. On October 26, 2001, Gianelli timely filed his notice of appeal from that order. Gianelli argued that the district court lacked authority to order him to make further payment on his restitution obligation because under California state law that obligation expired in 1997, ten years after the restitution judgment in the case.

On February 3, 2003, we vacated the district court's October 17, 2001 installment payment order, and remanded for further proceedings to determine whether restitution was ordered under the Federal

Probation Act ("FPA"),[1] or the Victim Witness Protection Act ("VWPA").[2] *See United States v. Gianelli,* 55 Fed. App'x. 831, 832 & n.1 (9th Cir. 2003). We did not reach the question whether the restitution obligation was still extant. *Id.*

On remand, the district court determined that the statutory basis for the restitution order was the VWPA. The district court then entered its May 1, 2007 order, reinstating the October 17, 2001 payment plan. The district court found that Gianelli had waived his argument as to the propriety of the amount of restitution by failing to appeal the 1987 judgment. The district court thus declined to consider Gianelli's argument that the original $125,000 restitution amount was not the government's actual loss as required by the VWPA under *Hughey,* 495 U.S. 411. The district court determined that the "VWPA did not at the time of defendant's offense limit the time in which [restitution] could be enforced." The district court also noted that "[d]uring the pendency of this remand . . . the United States received payment of $80,901.88 from the [voluntary] escrow sale of [Gianelli's] real property . . . [and] [t]he parties

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[1] 18 U.S.C. § 3651, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837 (1984) (effective Nov. 1, 1987).

[2] Pub. L. No. 97-291, § 5(a), 96 Stat. 1248 (1982) (codified at 18 U.S.C. §§ 3579(h) & 3580), *renumbered by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1837 (1984) (now at 18 U.S.C. §§ 3663 and 3664).

have stipulated that if the court finds that the restitution order is not time-barred . . . these funds will be applied to and fully satisfy defendant's restitution debt, absent a contrary order from the court of appeals." Gianelli now appeals this May 1, 2007 order.

II. STANDARD OF REVIEW

We review de novo questions of statutory interpretation. *United States v. Horvath*, 492 F.3d 1075, 1077 (9th Cir. 2007). "Whether an appellant has waived his statutory right to appeal is [also] a matter of law reviewed de novo." *United States v. Shimoda*, 334 F.3d 846, 848 (9th Cir. 2003) (internal citations omitted).

III. DISCUSSION

A. Enforcement of Restitution under the VWPA

On remand, the district court determined that the restitution order was predicated upon the VWPA. Gianelli does not dispute this determination. He argues that, under the then existing version of the VWPA, the government is forbidden from collecting the balance of his restitution debt because under California state law the ability to collect the restitution balance expired ten years after the date of his conviction.[3]

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[3] Judgment was entered in his case on May 13, 1987.

Gianelli is correct that California law typically precludes the issuance of a writ of execution to enforce a judgment when 10 years has passed since the judgment was entered. Cal. Civ. Proc. Code § 683.020. The VWPA provides that a judgment under that Act "may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action." 18 U.S.C. § 3579(h), *renumbered by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1837 (1984), *repealed by* Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 205(a)(2), 110 Stat. 1214, 1230 (1996). As Gianelli points out, according to Federal Rule of Civil Procedure 69(a)(1) federal enforcement by writ of execution "must accord with the procedure of the state where the court is located. . . . " Fed. R. Civ. P. 69(a)(1).

Although Federal Rule of Civil Procedure 69(a)(1) provides that the federal government's enforcement by writ of execution "must accord with the procedures of the state where the court is located," that Rule goes on to provide that notwithstanding this directive, "a federal statute governs to the extent it applies." Fed R. Civ. P. 69(a)(1). The Federal Debt Collection Procedures Act of 1990 ("FDCPA") is such a statute. The FDCPA provides that, with the exception of conflicting federal law, it "provides the exclusive civil procedures for the United States to . . . recover a judgment on a debt." 28 U.S.C. § 3001. "Debt" includes "an amount that is owing to the United States on account of . . . restitution. . . . " 28 U.S.C. § 3002(3)(B); *see also*

United States v. Mays, 430 F.3d 963, 965 (9th Cir. 2005) (concluding that the FDCPA's civil enforcement remedies may be used to enforce orders of restitution entered under the MVRA[4]). The FDCPA further provides that it "shall preempt State law to the extent such law is inconsistent." 28 U.S.C. § 3003(d).

Contrary to Gianelli's argument, the California state law at issue, California Civil Procedure Code section 683.020 (1987), which would preclude enforcement of a restitution judgment after ten years from the entry of that judgment, is such an inconsistent state law and is, therefore, preempted. The FDCPA provides no time limit for the collection of debts by writ of execution. *See* 28 U.S.C. § 3203. Further, because the purpose of the FDCPA "is to create a comprehensive statutory framework for the collection of debts owed to the United States government [and to] improve the efficiency and speed in collecting those debts," H.R. Rep. No. 101-736, at 32 (1990), a state law limiting such collection is inconsistent with the purpose of the act and is, therefore, preempted. *See Mays*, 430 F.3d at 965 (noting that the "FDCPA was enacted 'to give the Justice Department uniform Federal procedures – prejudgment remedies and postjudgment remedies – to collect debts owed the United States nationwide.'") (quoting H.R. Rep. No. 103-883, at 81 (1995)).

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[4] The statutory analysis in *Mays* applies equally to restitution ordered under the VWPA. *See* 18 U.S.C. §§ 3663(d); 3664(m)(1)(A)(i); 3613(a).

Although not binding upon us, the reasoning of *United States v. Pierce,* 231 B.R. 890, 893 (E.D.N.C. 1998) supports our conclusion. In *Pierce,* the district court rejected the argument that where the government proceeded to enforce a judgment under the FDCPA, Federal Rule of Civil Procedure 69(a)(1) incorporated a state law limitation prohibiting enforcement after ten years. *Id.* That court reasoned that, in light of the legislative history underlying the FDCPA and the language of the statute itself, binding the federal government to state law limitations on enforcement "would completely thwart the FDCPA's stated purpose of the creation of uniform federal procedures for the collection of debts to the federal government." *Id.* We agree.

We also reject Gianelli's contention that the Ex Post Facto Clause precludes enforcement of the extant restitution judgment under the FDCPA. It is well established that an Ex Post Facto violation occurs when a law "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Carmell v. Texas,* 529 U.S. 513, 522, 525 (2000) (quoting *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798)). Procedural changes, such as the enforcement mechanism provided by the FDCPA in Gianelli's case, which do not "alter[ ] the definition of criminal conduct or increase[ ] the penalty by which a crime is punishable," do not violate the Ex Post Facto Clause. *California Dep't of Corrections v. Morales,* 514 U.S. 499, 506 n.3 (1995); *see also Quarles v. Kane,* 482 F.3d

1154, 1155 (9th Cir. 2007) (amendment to California statute which increased the rate at which restitution payments could be collected was not an Ex Post Facto Clause violation because it did not impose additional punishment); *United States v. Baggett,* 125 F.3d 1319, 1323 (9th Cir. 1997) (procedural changes which made it less onerous for an United States Attorney to substantiate requested restitution amounts was not an Ex Post Facto Clause violation because the changes did not increase the available punishment).

In view of the foregoing, we conclude that because the government proceeded to collect Gianelli's VWPA restitution obligation by means of the FDCPA, the California limitation on enforcement set forth in California Code of Civil Procedure § 683.020 is inapplicable.[5]

B. Appeal of Restitution Amount

Gianelli also argues that the sentencing portion of the 1987 judgment that required him to pay

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[5] We express no opinion on whether, even though California law would bar the issuance of a writ of execution on the extant restitution judgment, California law would not preclude the federal government from filing a new lawsuit on the judgment and obtaining a renewed judgment that would be enforceable under California law. *See Custer v. McCutcheon,* 283 U.S. 514, 519 (1931); *Smith v. United States,* 143 F.2d 228, 229 (9th Cir. 1944); *see also United States v. Thornburg,* 82 F.3d 886, 893-894 (9th Cir. 1996); *United States v. Overman,* 424 F.2d 1142, 1147 n.7 (9th Cir. 1970); *Smith,* 143 F.2d at 229.

restitution in the amount of $125,000 was improper under *Hughey*. Interpreting 18 U.S.C. §§ 3579 and 3580 in *Hughey*, the Supreme Court held that "the language and structure of the [VWPA] make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey*, 495 U.S. at 413.

Gianelli was sentenced on May 13, 1987. He never appealed that sentence. The first time he filed an appeal related to his case was October 26, 2001. In that appeal, he challenged the October 17, 2001 district court Order Imposing Payment Plan for his outstanding restitution balance.[6]

Gianelli waived his ability to appeal the amount of restitution ordered in the 1987 judgment by failing to file a direct appeal from that judgment. *See United States v. James*, 109 F.3d 597, 599 (9th Cir. 1997) (concluding that where a defendant fails to raise an issue in his first direct appeal he waives the issue); *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994) (concluding that "nonconstitutional sentencing

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[6] Gianelli raised his *Hughey* objection in his reply brief related to that 2001 appeal. This does not affect the outcome of his case. In addition to the fact that arguments raised for the first time in a reply brief are generally considered waived, *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990), as discussed below, Gianelli waived his ability to appeal the amount of his restitution judgment by not timely appealing that judgment.

errors that have not been raised on direct appeal have been waived and generally may not be reviewed by way of [a habeas petition]"). *But see United States v. Broughton-Jones,* 71 F.3d 1143, 1147 (4th Cir. 1995) (holding, in the context of a valid waiver of appeal executed pursuant to a plea agreement, that "[b]ecause a restitution order imposed when it is not authorized by the VWPA is no less illegal than a sentence of imprisonment that exceeds the statutory maximum, appeals challenging the legality of restitution orders are . . . outside the scope of a defendant's otherwise valid appeal waiver.") (internal quotation marks omitted).

While Gianelli has not asserted any authority under which he might bring a collateral attack of the restitution order, in the somewhat analogous context of federal habeas relief, 28 U.S.C. § 2255, "an error of law [or fact] does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice."[7] *United States v. Addonizio,* 442 U.S. 178, 185-87 (1979) (internal citations and quotation marks omitted) (noting that a "complete miscarriage of justice" would occur if a court refused to vacate a sentence where the conduct for which a

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[7] Gianelli cannot present his claim for relief from the restitution order as a habeas petition because he is not seeking release from custody, and because review of restitution orders is not properly brought in a habeas petition. *See United States v. Thiele,* 314 F.3d 399, 401 (9th Cir. 2002).

defendant was convicted was subsequently made legal) (citing *Davis v. United States,* 417 U.S. 333 (1974)); *see also United States v. Wilcox,* 640 F.2d 970, 973 (9th Cir. 1981) ("Errors of law which might require reversal of a conviction or sentence on appeal do not necessarily provide a basis for [habeas relief].").

The indictment which contained the count to which Gianelli pleaded guilty alleged that Gianelli and others, as a result of an illegal scheme, received approximately $160,000 in cash. The sentencing court, by way of the Presentence Report, was aware of this amount, and was aware of Gianelli's assets, income, and liabilities. The Presentence Report also indicated that Gianelli "appears to have used approximately $50,000 from the kickback scheme in the purchase of his current residence in 1983," and that Gianelli "appears to have been the primary mover of the scheme, and without his knowledge and cooperation the scheme could not have been carried out." In addition, after our remand in Gianelli's appeal of the October 17, 2001 order, the district court noted, "[d]uring the pendency of this remand . . . the United States received payment of $80,901.88 from the [voluntary] escrow sale of [Gianelli's] real property. . . . The parties have stipulated that if the court finds that the restitution order is not time-barred . . . these funds will be applied to and fully satisfy defendant's restitution debt, absent a contrary order from the court of appeals." In light of these factors, it would not be a "complete miscarriage of justice" if

Gianelli were precluded from collaterally attacking the amount of his restitution obligation.

Gianelli argues that his right to challenge the amount of the restitution judgment should not be forfeited by reason of his failure to file a direct appeal back in 1987 because the decision in *Hughey* did not come down until 1990. This argument is unpersuasive.

In 1987 when Gianelli was sentenced, the VWPA provided,

> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, *shall consider the amount of the loss* sustained by any victim *as a result of the offense,* the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

Hughey, 495 U.S. at 416-17 (quoting 18 U.S.C. § 3580(a) (1982)) (emphasis added). The *Hughey* court simply reaffirmed what the Act had already "ma[d]e plain": that it was "Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 413. If Gianelli thought the amount of restitution ordered was inappropriate back in 1987, he could have appealed that order. *See Schlesinger,* 49 F.3d at 486 (holding that failure to raise an issue on direct appeal was not excusable where "there is

absolutely no reason why [the defendant] should not have known of, and been able to appeal, the alleged errors immediately") (internal quotation marks omitted).

Gianelli further argues that he could not have appealed the amount of the restitution order earlier because it was not until May 2007 that the district court determined the VWPA was the basis for the order. This argument is likewise unpersuasive. The two possible bases for the restitution order in 1987 were the VWPA and the FPA. *See Gianelli,* 55 Fed. App'x. at 832. As we have previously stated, Gianelli could have appealed the amount of the restitution order under the VWPA if he had been inclined to bring that appeal in 1987. In addition, at the time of Gianelli's sentencing in May 1987, the FPA provided that a defendant "[m]ay be required to make restitution or reparation to aggrieved parties *for actual damages or loss caused by the offense* for which conviction was had." 18 U.S.C.A. § 3651 (repealed Nov. 1, 1987). If Gianelli had been inclined, when he was sentenced, to challenge the amount of his restitution obligation on the ground he now asserts, he could have done so under the then express language of the FPA. *See Schlesinger,* 49 F.3d at 486.

IV. CONCLUSION

Because the government proceeded under the FDCPA to enforce the restitution judgment against Gianelli, the government is not bound by California

Code of Civil Procedure § 683.020, and enforcement is not precluded by the Ex Post Facto Clause. Gianelli waived his objection to the amount of the 1987 restitution order by failing to file a timely direct appeal.

The judgment of the district court is **AFFIRMED.**

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. RONALD J. GIANELLI, *Defendant-Appellant*.	No. 07-10233 D.C. No. CR-86-20083-RMW OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
February 12, 2008 – San Francisco, California

Filed March 20, 2008

Before: William C. Canby, Jr., David R. Thompson, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Thompson

COUNSEL

Patrick James Sullivan, Oakland, California, for the defendant-appellant.

Richard A. Friedman, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

THOMPSON, Senior Circuit Judge:

In May of 1987, Ronald J. Gianelli ("Gianelli") pleaded guilty to one count of mail fraud, 18 U.S.C. § 1341 ("mail fraud"), in the Northern District of California. As part of his sentence he was ordered to pay restitution to the federal government in the amount of $125,000. Gianelli did not appeal that judgment.

Gianelli now appeals a May 2007 district court order reinstating an October 17, 2001 Order Imposing Payment Plan aimed at collecting the remaining amount of restitution owed. Gianelli contends that the government is barred from enforcing the restitution judgment because ten years from the date of that judgment passed on May 13, 1997, and California state law precludes enforcement of a judgment after that period of time. He further argues that the original $125,000 restitution amount was improper because it was not predicated upon the government's actual loss, as required by *Hughey v. United States*, 495 U.S. 411 (1990).

We have jurisdiction under 28 U.S.C. § 1291. We conclude that Gianelli waived the right to appeal the amount of the restitution order by failing to file a direct appeal, and we affirm the district court's May 1, 2007 order reinstating the October 17, 2001 payment plan.

I. BACKGROUND

An indictment filed on July 31, 1986, in the United States District Court for the Northern District of California charged Gianelli with six counts of mail fraud, conspiracy to defraud the United States, and 17 counts of receiving kickbacks on subcontracts for Defense Department procurement contracts. Gianelli pleaded guilty to one count of mail fraud. The remaining counts were dismissed. He was sentenced on May 13, 1987 to five years of imprisonment, with all but six months suspended, and ordered to pay $125,000 in restitution to the United States. The remaining counts were dismissed.

On October 29, 1991, while Gianelli was on probation, he entered into an agreement with the Probation Office that he would make payments of $100 per month toward the satisfaction of his restitution debt. Gianelli substantially made the payments as agreed. Then, on December 15, 1999, in an attempt to satisfy the outstanding balance of $109,300, the government applied for a writ of execution under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3203. The government wanted to levy the writ on a house and 52 acres of land belonging to Gianelli. After numerous objections, the district court, by a September 19, 2001 order, adopted the magistrate judge's finding that the United States was "entitled to issuance of the writ," but the court suggested an alternative payment plan by which "in lieu of execution . . . it would be just . . . to allow [Gianelli] to pay his debt in monthly installments, including interest

so as to provide the United States with the full value to which it is entitled. . . ."

On September 25, 2001, Gianelli agreed to the installment payment alternative, but expressly reserved his objection to the government's right to collect his restitution obligation. On October 17, 2001, the district court entered the installment payment order. On October 26, 2001, Gianelli timely filed his notice of appeal from that order. Gianelli argued that the district court lacked authority to order him to make further payment on his restitution obligation because under California state law that obligation expired in 1997, ten years after the restitution judgment in the case.

On February 3, 2003, we vacated the district court's October 17, 2001 installment payment order, and remanded for further proceedings to determine whether restitution was ordered under the Federal Probation Act ("FPA")[1], or the Victim Witness Protection Act ("VWPA").[2] *See United States v. Gianelli,* 55 Fed. App'x. 831, 832 & n.1 (9th Cir. 2003). We did not reach the question whether the restitution obligation was still extant. *Id.*

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[1] 18 U.S.C. § 3651, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837 (1984) (effective Nov. 1, 1987).

[2] Pub. L. No. 97-291, § 5(a), 96 Stat. 1248 (1982) (codified at 18 U.S.C. §§ 3579(h) & 3580), *renumbered by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1837 (1984) (now at 18 U.S.C. §§ 3663 and 3664).

On remand, the district court determined that the statutory basis for the restitution order was the VWPA. The district court then entered its May 1, 2007 order, reinstating the October 17, 2001 payment plan. The district court found that Gianelli had waived his argument as to the propriety of the amount of restitution by failing to appeal the 1987 judgment. The district court thus declined to consider Gianelli's argument that the original $125,000 restitution amount was not the government's actual loss as required by the VWPA under *Hughey,* 495 U.S. 411. The district court determined that the "VWPA did not at the time of defendant's offense limit the time in which [restitution] could be enforced." The district court also noted that "[d]uring the pendency of this remand . . . the United States received payment of $80,901.88 from the [voluntary] escrow sale of [Gianelli's] real property . . . [and] [t]he parties have stipulated that if the court finds that the restitution order is not time-barred . . . these funds will be applied to and fully satisfy defendant's restitution debt, absent a contrary order from the court of appeals." Gianelli now appeals this May 1, 2007 order.

II. STANDARD OF REVIEW

We review de novo questions of statutory interpretation. *United States v. Horvath,* 492 F.3d 1075, 1077 (9th Cir. 2007). "Whether an appellant has waived his statutory right to appeal is [also] a matter of law reviewed de novo." *United States v. Shimoda,*

334 F.3d 846, 848 (9th Cir. 2003) (internal citations omitted).

III. DISCUSSION

A. Enforcement of Restitution under the VWPA

On remand, the district court determined that the restitution order was predicated upon the VWPA. Gianelli does not dispute this determination. He argues that, under the then existing version of the VWPA, the government is forbidden from collecting the balance of his restitution debt because under California state law the ability to collect the restitution balance expired ten years after the date of his conviction.

The applicable version of the VWPA gave no explicit time limit for the enforcement of judgments under it. The Act provided that, "An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action." 18 U.S.C. § 3579(h), *renumbered by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1837 (1984), *repealed by* Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 205(a)(2), 110 Stat. 1214, 1230 (1996). To determine what this provision means, Gianelli relies upon Federal Rule of Civil Procedure 69(a)(1) which provides:

> A money judgment is enforced by a writ of execution, unless the court directs otherwise.

> The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – *must accord with the procedure of the state where the court is located,* but a federal statute governs to the extent it applies.

(emphasis added). Gianelli also points out that the law of California, which is the "state where the court [in his case] is located," provides,

> Except as otherwise provided by statute, upon the expiration of 10 years after the date of entry of a money judgment or a judgment for possession or sale of property: (a) The judgment may not be enforced. (b) All enforcement procedures pursuant to the judgment or to a writ or order issued pursuant to the judgment shall cease. (c) Any lien created by an enforcement procedure pursuant to the judgment is extinguished.

Cal. Civ. Proc. Code § 683.02 (1987). In view of this, Gianelli argues that the government may no longer collect restitution from him, because ten years after the date of entry of the restitution judgment passed on May 13, 1997.[3]

The government and the district court, however, argue persuasively that 18 U.S.C. § 3579(h) cannot be interpreted to constrain the federal government's ability to enforce its own restitution judgments

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[3] Judgment was entered in his case on May 13, 1987.

because, "as a sovereign, the United States is subject to a limitations period only when Congress has expressly created one." *United States v. Thornburg,* 82 F.3d 886, 893 (9th Cir. 1996) (citing *Guaranty Trust Co. v. United States,* 304 U.S. 126, 133 (1938), and quoting *United States v. Dos Cabezas Corp.,* 995 F.2d 1486, 1489 (9th Cir. 1993) ("In the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period.")); *see also United States. v. Overman,* 424 F.2d 1142, 1147 n.7 (9th Cir. 1970) (concluding that enforcement of a federal tax lien was not subject to state limitations, and pointing out "the established rule that a state statute of limitation cannot run against the United States" without permission of a federal statute) (citing *United States v. Summerlin,* 310 U.S. 414, 416 (1940)); *Smith v. United States,* 143 F.2d 228, 229 (9th Cir. 1944) (interpreting statutory language which provided that a judgment imposing a fine could be enforced, "in like manner as judgments in civil cases are enforced," as imposing no limitation on the federal government's ability to enforce the judgment and explaining "[i]n the absence of a specific act of Congress to the contrary, state statutes of limitation do not bind the sovereign").

We agree with the position of the district court. Because no federal statute expressly permits state statutes of limitations to constrain the government's ability to enforce a judgment granted under the VWPA, Gianelli's argument that the government

lacks the ability to enforce the restitution order after the passage of ten years fails.

B. Appeal of Restitution Amount

Gianelli also argues that the sentencing portion of the 1987 judgment that required him to pay restitution in the amount of $125,000 was improper under *Hughey*. Interpreting 18 U.S.C. §§ 3579 and 3580 in *Hughey*, the Supreme Court held that "the language and structure of the Act make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey*, 495 U.S. at 413.

Gianelli was sentenced on May 13, 1987. He never appealed that sentence. The first time he filed an appeal related to his case was October 26, 2001. In that appeal, he challenged the October 17, 2001 district court Order Imposing Payment Plan for his outstanding restitution balance.[4]

Gianelli waived his ability to appeal the amount of restitution ordered in the 1987 judgment by failing

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[4] Gianelli raised his *Hughey* objection in his reply brief related to that 2001 appeal. This does not affect the outcome of his case. In addition to the fact that arguments raised for the first time in a reply brief are generally considered waived, *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990), as discussed below, Gianelli waived his ability to appeal the amount of his restitution judgment by not timely appealing that judgment.

to file a direct appeal from that judgment. *See United States v. James,* 109 F.3d 597, 599 (9th Cir. 1997) (concluding that where a defendant fails to raise an issue in his first direct appeal he waives the issue); *United States v. Schlesinger,* 49 F.3d 483, 485 (9th Cir. 1994) (concluding that "nonconstitutional sentencing errors that have not been raised on direct appeal have been waived and generally may not be reviewed by way of [a habeas petition]"). *But see United States v. Broughton-Jones,* 71 F.3d 1143, 1147 (4th Cir. 1995) (holding, in the context of a valid waiver of appeal executed pursuant to a plea agreement, that "[b]ecause a restitution order imposed when it is not authorized by the VWPA is no less illegal than a sentence of imprisonment that exceeds the statutory maximum, appeals challenging the legality of restitution orders are . . . outside the scope of a defendant's otherwise valid appeal waiver.") (internal quotation marks omitted).

While Gianelli has not asserted any authority under which he might bring a collateral attack of the restitution order, in the somewhat analogous context of federal habeas relief, 28 U.S.C. § 2255, "an error of law [or fact] does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice."[5] *United States v. Addonizio,*

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[5] Gianelli cannot present his claim for relief from the restitution order as a habeas petition because he is not seeking release from custody, and because review of restitution orders is

(Continued on following page)

442 U.S. 178, 185-87 (1979) (internal citations and quotation marks omitted) (noting that a "complete miscarriage of justice" would occur if a court refused to vacate a sentence where the conduct for which a defendant was convicted was subsequently made legal) (citing *Davis v. United States,* 417 U.S. 333 (1974)). *See also United States v. Wilcox,* 640 F.2d 970, 973 (9th Cir. 1981) ("Errors of law which might require reversal of a conviction or sentence on appeal do not necessarily provide a basis for [habeas relief].").

The indictment which contained the count to which Gianelli pleaded guilty alleged that Gianelli and others, as a result of an illegal scheme, received approximately $160,000 in cash. The sentencing court, by way of the Presentence Report, was aware of this amount, and was aware of Gianelli's assets, income, and liabilities. The Presentence Report also indicated that Gianelli "appears to have used approximately $50,000 from the kickback scheme in the purchase of his current residence in 1983," and that Gianelli "appears to have been the primary mover of the scheme, and without his knowledge and cooperation the scheme could not have been carried out." In addition, after our remand in Gianelli's appeal of the October 17, 2001 order, the district court noted, "[d]uring the pendency of this remand . . . the United

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not properly brought in a habeas petition. *See United States v. Thiele,* 314 F.3d 399, 401 (9th Cir. 2002).

States received payment of $80,901.88 from the [voluntary] escrow sale of [Gianelli's] real property. . . . The parties have stipulated that if the court finds that the restitution order is not time-barred . . . these funds will be applied to and fully satisfy defendant's restitution debt, absent a contrary order from the court of appeals." In light of these factors, it would not be a "complete miscarriage of justice" if Gianelli were precluded from collaterally attacking the amount of his restitution obligation.

Gianelli argues that his right to challenge the amount of the restitution judgment should not be forfeited by reason of his failure to file a direct appeal back in 1987 because the decision in *Hughey* did not come down until 1990. This argument is unpersuasive.

In 1987 when Gianelli was sentenced, the VWPA provided,

> The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, *shall consider the amount of the loss* sustained by any victim *as a result of the offense,* the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

Hughey, 495 U.S. at 416-17 (quoting 18 U.S.C. § 3580(a) (1982)) (emphasis added). The *Hughey* court simply reaffirmed what the Act had already "ma[d]e

plain," that it was "Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Id.* at 413. If Gianelli thought the amount of restitution ordered was inappropriate back in 1987, he could have appealed that order. *See Schlesinger,* 49 F.3d at 486 (holding that failure to raise an issue on direct appeal was not excusable where "there is absolutely no reason why [the defendant] should not have known of, and been able to appeal, the alleged errors immediately") (internal quotation marks omitted).

Gianelli further argues that he could not have appealed the amount of the restitution order earlier because it was not until May 2007 that the district court determined the VWPA was the basis for the order. This argument is likewise unpersuasive. The two possible bases for the restitution order in 1987 were the VWPA and the FPA. *See Gianelli,* 55 Fed. App'x. at 832. As we have previously stated, Gianelli could have appealed the amount of the restitution order under the VWPA if he had been inclined to bring that appeal in 1987. In addition, at the time of Gianelli's sentencing in May 1987, the FPA provided that a defendant "[m]ay be required to make restitution or reparation to aggrieved parties *for actual damages or loss caused by the offense* for which conviction was had." 18 U.S.C.A. § 3651 (repealed Nov. 1, 1987). If Gianelli had been inclined, when he was sentenced, to challenge the amount of his restitution obligation on the ground he now asserts, he could

have done so under the then express language of the FPA. *See Schlesinger,* 49 F.3d at 486.

IV. CONCLUSION

Because the VWPA does not express the intent that the federal government will be bound by state statutes of limitations in the enforcement of restitution judgments, and because neither that Act nor any other federal statute limits the time for enforcement of restitution judgments under the VWPA, the government may enforce against Gianelli the VWPA restitution judgment at any time. Gianelli waived his objection to the amount of the 1987 restitution order by failing to file a timely direct appeal.

The judgment of the district court is **AFFIRMED**.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RONALD JOHN GIANELLI, Defendant.	Case No. CR-86-20083-RMW ORDER REINSTATING THE OCTOBER 17, 2001 RESTITUTION ORDER **[Re Docket Nos. 113 and 114]** (Filed May 1, 2007)

The Ninth Circuit vacated this court's October 17, 2001 order establishing a monthly payment plan for the satisfaction of the unpaid balance of a restitution order imposed in 1987 and remanded the case "so that the district court may specify the statutory basis upon which it relied to order restitution." *United States v. Gianelli,* 55 Fed. Appx. 831, 832 (9th Cir. 2003). The court has reviewed the briefs submitted by the parties including supplemental briefs requested by the court on the question of whether the statute of limitations under California Code of Civil Procedure § 683.020 ("CCP § 683.020") bars enforcement of the order and heard oral argument. For the reasons set

forth below, the court reinstates the October 17, 2001 restitution order.[1]

I. BACKGROUND

Defendant Robert Gianelli was charged with twenty-four counts alleging criminal offenses arising out of an alleged kickback scheme designed to defraud FMC Corporation, a supplier of equipment and services to the Department of Defense. After plea negotiations, defendant pled guilty to one count of using a U.S. Postal depository to mail a purchase order for the purpose of executing the scheme. In exchange for pleading guilty to this count, the United States dropped all other charges.

On May 13, 1987 the district judge sentenced defendant to five years of custody with all but six months suspended. Defendant was placed on probation for the suspended four and a half years (subject to release from probation "when found to be appropriate") and ordered to pay $125,000 in restitution. However, the district judge did not expressly state in

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[1] During the pendency of this remand, specifically on December 27, 2004, the United States received payment of $80,901.88 from the escrow of the sale of real property owned by defendant on which the government had recorded liens. The parties have stipulated that if the court finds that the restitution order is not time-barred by either the FPA or CCP § 683.020, these funds will be applied to and fully satisfy defendant's restitution debt, absent a contrary order from the court of appeals.

his Judgment and Probation Order ("1987 Restitution Order") whether he relied on the Federal Probation Act ("FPA")[2] or the Victim and Witness Protection Act ("VWPA")[3] as the statutory basis for the restitution award. During his four and a half years of probation, defendant consistently paid $100 per month toward the satisfaction of the restitution award. When defendant's probation ended in 1991, he continued to make monthly payments of $100 "for years after his probation terminated[.]" Chang Decl., ¶ 10. Nevertheless, in 2001 the United States sought a writ of execution which defendant moved to quash. On October 17, 2001 the district judge, rather than issue the writ, established a monthly payment plan to satisfy the unpaid restitution ("2001 Installment Order" or "October 17, 2001 restitution order"). Defendant appealed the 2001 Installment Order which the Ninth Circuit vacated and remanded to this court. The district judge who issued the 1987 Restitution Order and the 2001 Installment Order has retired and is unavailable to hear this matter. Therefore, it was reassigned to the undersigned.

II. ANALYSIS

A. Statutory Bases for Restitution

The task before this court is to determine whether the district judge's 1987 Restitution Order

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[2] 18 U.S.C. § 3651 (repealed 1987).

[3] 18 U.S.C. §§ 3663, 3664.

relied on the FPA or the VWPA. The task is made more difficult because the transcript of the sentencing hearing is not available.

B. Presumption of Reliance on the VWPA

The government submits that when a district court has not clearly indicated whether restitution is based on the FPA or the VWPA courts reviewing the grant of restitution generally presume the district court relied on the VWPA. Several circuits follow this rule, holding that "unless a clear intention appears to the contrary, we will assume restitution orders are made pursuant to the broader provisions of the VWPA." *United States v. Chaney,* 964 F.2d 437, 451 (5th Cir. 1992); *United States v. Cook,* 952 F.2d 1262, 1264 (10th Cir. 1991); *United States v. Padgett,* 892 F.2d 445, 448 (6th Cir. 1989); *see also United States v. Kress,* 944 F.2d 155, 158 (3d Cir. 1991) ("Where the district court fails to specify whether the FPA or the VWPA authorized its actions, the general rule is that the VWPA controls."); *United States v. Ferrera,* 746 F.2d 908, 914 (1st Cir. 1984) ("[W]e foresee little or no resort to [the FPA] in the future, it having been effectively superceded in most cases by the broader restitution provision of the Victim and Witness Protection Act of 1982[.]"). Although the Ninth Circuit has not expressly adopted this presumption, such a presumption is supported by sound logic.

Under the FPA a court could only grant restitution if it were made a condition of probation. 18

U.S.C. § 3651 (repealed 1987). In contrast, the VWPA does not limit the payment of restitution to the period of probation. "[T]he court, when sentencing defendant convicted of an offense . . . may order . . . that the defendant make restitution to any victim of such offense." 18 U.S.C. § 3663(a). The VWPA, therefore, gives the court more flexibility in fashioning a sentence that can balance the need for supervision with the need to compensate victims. *See Padgett,* 892 F.2d at 448; *Ferrera,* 746 F.2d at 914. The VWPA appears to reflect an interest in seeing victims fully compensated as it requires a judge who orders only partial or no restitution to state his or her reasons for doing so. 18 U.S.C. § 3579(a)(2). This public policy concern is further indicated by the fact that the FPA was repealed effective November 1, 1987. *See Padgett,* 892 F.2d at 448. The VWPA, however, has continued in effect since the repeal of the FPA, and was even amended by Congress in 1990. *United States v. Grice,* 319 F.3d 1174, 1177 (9th Cir. 2003). Thus, it appears that the VWPA sets forth a preferred approach to restitution.

C. The Statutory Basis of 1987 Restitution Order

Several reasons suggest that the district judge relied on the VWPA in imposing restitution in his 1987 Restitution Order. First, as discussed above, other circuits presume an award under the VWPA. Second, the Judgment and Probation Order issued

May 14, 1987 does not appear to make restitution a condition of probation. It provides:

> Five (5) years and all but Six (6) months is suspended, and the defendant is placed on probation for the remaining time and is to be released from probation when found to be appropriate. The defendant is to make restitution in the amount of $125,000.00.

Judgment and Probation Order. Since under the FPA restitution could only be granted as a condition of probation, the lack of a clear expression that restitution was a condition of probation suggests the award was made under VWPA. *See* 18 U.S.C. § 3651 (repealed 1987); *United States v. Snider,* 957 F.2d 703, 706 (9th Cir. 1992) ("Because the district court did not even grant Snider probation, let alone condition his probation upon the payment of restitution, it follows that the FPA does not authorize the court's order."); *United States v. Angelica,* 859 F.2d 1390, 1393 (9th Cir. 1988) ("Because the district court ordered immediate restitution apart from Angelica's probation, we review the order as one authorized by the VWPA.").[4]

The district judge also appears to have been relying on the VWPA because on two separate occasions he approved post-probationary payments of restitution. On October 17, 1991 he allowed defendant's probation to

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[4] The lack of a transcript, of course, precludes a review of what the court actually stated at sentencing.

expire but continued his obligation to pay restitution after expiration. On September 19, 2001 when he considered defendant's request to quash a writ of execution, he continued defendant's obligation to pay his restitution. Since defendant's probation ended in 1991, and since the FPA did not authorize restitution payments after probation ended, the actions by the district judge suggest that he was relying on the VWPA. One assumes the district judge knows the law and applies it correctly. *United States v. Cervantes-Valenzuela,* 931 F.2d 27, 29 (9th Cir. 1991). Further, it does not follow logically that the court in October 1991 would order monthly installments on a significant restitution balance if the monthly installment plan would immediately expire.

The defendant's argument that restitution was ordered under the FPA is not as persuasive as the government's contention that it was ordered pursuant to the VWPA. Defendant argues that there was no determination of defendant's ability to pay a $125,000 restitution order. Since the VWPA requires a determination of defendant's ability to pay restitution before it can be ordered, defendant claims that the district judge must not have relied on the VWPA. However, the Ninth Circuit has consistently held that a district court need not make express findings regarding a defendant's ability to pay restitution. *United States v. Baggett,* 125 F.3d 1319, 1323 (9th Cir. 1997) ("[T]he [district] court need not make express findings of fact about appellants' financial condition[.]"); *United States v. Sablan,* 92 F.3d 865, 871

(9th Cir. 1996) ("[T]he district court is not required to make findings of fact regarding the defendant's financial condition[.]"). All that is required is that the "record must reflect that the district court had at its disposal information relating to [appellants'] financial condition" and that "the district court considered [appellants'] financial condition." *Baggett,* 125 F.3d at 1323-24.

In the present case, the district judge did have access to information relating to defendant's financial condition. The eighth page of the Presentence Report outlined defendant's financial condition, showing monthly income that slightly exceeded monthly expenditures and a net worth of $217,000. Normally, however, some indication that the district court judge examined the presentence report is required. *United States v. English,* 92 F.3d 909, 917 (9th Cir. 1995) ("Moreover, the Presentence Report, which the court indicated it had 'read, reviewed, and considered,' contained information regarding English's future ability to pay."); *United States v. Bachsian,* 4 F.3d 796, 800 (9th Cir. 1993) ("Here, the record reflects that the district court considered the presentence report in deciding whether to order restitution. Moreover, the presentence report contained information regarding the defendant's financial condition and future ability to pay."); *United States v. Cannizzaro,* 871 F.2d 809, 812 (9th Cir. 1989) ("The district court made specific reference to [the presentence] report's findings during Cannizzaro's sentencing hearing. This provides sufficient basis for concluding that the

district court discharged its responsibilities under [the VWPA]."). Here, however, since the transcript from the sentencing hearing is unavailable, there is no available confirmation that the district judge examined the Presentence Report. Nevertheless, it appears very likely that the district judge would have relied on the financial information in the report. Since the district judge ordered restitution and was provided financial information, it is difficult to believe he did not consider the information in exercising his sentencing authority. *See* Fed. R. Crim. P. 32; *see also Sablan,* 92 F.3d at 871 (suggesting that mere access to a defendant's financial condition in a PSR provides a sufficient record).

The defendant correctly points out that a letter from defendant's probation officer to the district judge characterized the restitution as a "condition of probation."[5] Sullivan Decl., Ex. D. In the letter the probation officer proposed that defendant's probation be allowed to expire and that defendant continue to pay restitution. The judge approved of this plan. Defendant argues that by endorsing a letter characterizing restitution as a "condition of probation," the district judge implicitly indicated that he relied on the FPA. However, when the district judge endorsed the

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[5] When restitution is a "condition of probation" the FPA is the statutory basis for the grant of restitution. *United States v. Duvall,* 926 F.2d 875, 876 (9th Cir. 1991) ("Orders of restitution made as a special condition of probation may only be made under 18 U.S.C. § 3651 [of the FPA].")

probation officer's letter, he did not say that he was relying on the FPA as the statutory basis for his grant of restitution – he was merely approving the termination of probation and the continued payment of restitution. Defendant cannot fairly conclude that because the probation officer characterized the restitution as a "condition of probation," that the judge ordered it as a condition of probation.

D. Government's Actual Losses

Defendant argues that if this court finds that the VWPA applies then it should also determine whether the $125,000 restitution was based on the government's actual losses. The scope of the Ninth Circuit's remand does not include the determination of the actual loss. That determination, therefore, is not a remanded issue. Further, it appears that defendant has previously waived or defaulted on this question. It is true that a district court relying on the VWPA must make a finding of the amount of the actual loss. *See Grice,* 319 F.3d at 1176 (quoting *Hughey v. United States,* 495 U.S. 411, 413 (1990)); *United States v. Barany,* 884 F.2d 1255, 1261 (9th Cir. 1989) ("[T]he VWPA require[s] a sentencing court to establish the losses resulting from defendant's conduct as a basis for ordering appropriate restitution."). Here, without a transcript, it cannot be established whether the district judge based restitution on actual losses. The Presentence Report does say that "[t]here is no way to determine specific monetary losses as a result of this offense." PSR at 2; *see* PSR at 10. Consequently, there

is some evidence that the district judge may not have based his restitution award on the government's actual losses.

Nevertheless, if defendant had wanted to challenge the award of restitution because the dollar amount was not tied to the government's actual losses, he had prior opportunity to do so, and, for whatever reason, chose not do so. The original restitution award was made in 1987 and it was modified in 1991. On neither occasion did defendant appeal the amount of the award. Defendant has waived any argument that the amount of restitution was not tied to the amount of the government's actual losses.

E. No Statute of Limitations on Enforcement

Defendant argues that if restitution was ordered under the VWPA, the time period for enforcement has expired. As a preliminary matter both sides argue that the law of the case precludes this court from addressing any statute of limitations issue. The government contends that the statute of limitations issue was decided against defendant before his appeal to the Ninth Circuit, the issue was argued before the Ninth Circuit and the scope of the remand order did not authorize consideration of the statute of limitations question. The remand order, contends the government, only authorized this court to reinstate its October 17, 2001 restitution order if it determined that the VWPA was the statutory basis for the order.

Defendant, on the other hand, contends that the magistrate judge's August 29, 2001 report and recommendation adopted by the district judge on September 19, 2002, found that CCP § 683.020 set forth a 10-year limitation on collection at the time of defendant's offense but it had been superceded by the implementation of the 20-year limitation authorized by way of 18 U.S.C. §§ 3664(m)(1)(A)(i), 3613(b) and (f). Therefore, defendant contends that since the parties agree that the magistrate judge overlooked the fact that the 20-year limit only applied to offenses committed after the date of defendant's offense, the magistrate judge's determination that CCP § 683.020 applied at the time of defendant's offense is the law of the case.

The court does not agree with either party with respect to the law of the case. The court of appeals expressly stated in a footnote: "[w]e express no opinion, however, on the merits of Gianelli's contention that the Federal Debt Collection Procedures Act.. 28 U.S.C. § 3203, established a ten year limitations period to the government's ability to enforce the restitution order." *Gianelli,* 55 Fed. Appx. at 832. It seems logical that the court of appeals, despite the limiting language of the order of remand, intended this court to reach the statute of limitations issue if it determined that the VWPA applied.

The statute implementing the VWPA at the time of defendant's offense was 18 U.S.C. § 3579 which provided no time limit for enforcement but stated that an order of restitution "may be enforced . . . in

the same manner as a judgment in a civil action." Based upon that provision defendant contends that Rule 69(a) of the Federal Rules of Civil Procedure applies which says that the process to enforce a judgment for the payment of money is a writ of execution in accordance with state law. CCP § 683.020 places a 10-year limitation on the enforcement of judgments unless they are renewed. Therefore, defendant asserts that July 13, 1997 was the last day on which the government could collect restitution.[6]

The application of CCP 683.020's limitation period presents what appears to be an issue of first impression. However, the court concludes that the legislature did not intend by the language in 18 U.S.C. § 3579, providing that restitution "may be enforced . . . in the same manner as a judgment in a civil action," and by Rule 69(a)'s adoption of California's execution procedures to set a statute of limitation on the collection of restitution. In the absence of a federal statute expressly imposing or adopting a statute of limitations, the United States is not bound by any state limitations period. *United States v. Thornburg,* 82 F.3d 886, 893 (9th Cir. 1996). In *Miller v. United States,* 160 F.2d 608 (9th Cir. 1947), the court upheld the government's bringing a second suit on a judgment for a criminal fine even though the state time limit for execution on the first judgment

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[6] The stipulation between the government and defendant states that the district court issued a judgment on May 14, 1987 which was entered July 13, 1987.

had expired. It held that the California time limit for execution on a judgment which is utilized for federal judgments under Rule 69(a) is not a statute of limitations on the collection of the judgment. Similarly, in *Smith v. United States,* the court held that a local district court rule relating to executions and making state practice applicable thereto did not preclude collection of a judgment despite state time limitations. 143 F.2d 228 (9th Cir. 1944); *see United States v. Pierce,* 231 B.R. 890 (E.D.N.C. 1998) (holding that the United States was not bound pursuant to Rule 69(a) by state statute that prohibited creditors from enforcing judgment against personal property of debtor more than ten years after judgment was rendered); *see also United States v. Jenkins,* 141 F. Supp. 499 (S.D. Ga. 1956) (holding that the United States was not subject to state statutes imposing time limits on suits on dormant judgments).

The government cites *United States v. Soderling,* 970 F.2d 529 (9th Cir. 1992), as supporting the proposition that an order of restitution made under the VWPA at the time the subject order was imposed is not limited in duration. The court in *Soderling* made the statement that the defendant's restitution order could be extinguished only by satisfaction and not by the passage of time. *Id.* at 535. The court further noted that the VWPA did not, at the time, expressly require an order of restitution to be limited in duration. *Id* at n.12. The case, however, did not discuss Rule 69(a) and the effect of its authorization of state execution procedures. Therefore, the only light that

Soderling sheds on the current issue is the suggestion that restitution orders had no duration limits at the time the subject order was made.

The court concludes that CCP § 683.020 does not preclude the reinstatement of the October 17, 2001 restitution. The VWPA did not at the time of defendant's offense limit the time in which it could be enforced. It further appears that the authorization by way of Rule 69(a) to use California's execution procedures was not intended to limit the collection of federal criminal judgments to ten years but was rather intended to provide creditors with the state procedure for execution. Finally, the public policy of making defendant's responsible for compensating victims for their losses supports the conclusion that at the time of defendant's offense no time limit was prescribed for collection.

III. ORDER

For the foregoing reasons, the court reinstates the October 17, 2001 restitution order.

DATED: 5/1/07

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

THIS SHALL CERTIFY THAT A COPY OF THIS ORDER WAS PROVIDED TO:

Counsel for plaintiff:

Douglas K. Chang
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, CA 94102

Counsel for defendant:

Patrick Sullivan
436 14th Street, Suite 1112
Oakland, CA 94612

Date: 5/1/07

SPT
Chambers of Judge Whyte

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RONALD JOHN GIANELLI, Defendant.	CR 86-20083-02 SW ORDER IMPOSING PAYMENT PLAN; DENYING MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION (Filed Oct. 17, 2001)

On April 25, 2001, the United States submitted to the Court an application for a writ of execution on the Tuolumne County property belonging to Defendant Ronald John Gianelli. For the reasons set forth in the Order Adopting Magistrate Judge's Report and Recommendation, filed September 19, 2001, and in light of the acceptance by Mr. Gianelli,[1] the Court ORDERS as follows:

- Defendant shall make monthly payments to the United States in the amount of $1,667.

[1] Mr. Gianelli states that as a condition of his acceptance he reserves the right to have accounting errors corrected, to appeal the order imposing the payment plan, and to appeal issues concerning execution and enforcement. *See* Defendant's Acceptance of Alternative to Writ of Execution, filed September 25, 2001.

- The monthly payments are payable from June 1, 2001 to May 1, 2007, consistent with the applicable 20-year limitations period.
- The June 1, 2001 to November 1, 2001 payments are due in one lump sum of $10,092 on November 1, 2001, with a grace period of 15 calendar days.
- All payments thereafter are due on the first of the month.
- The United States retains the right to apply for a writ of execution (or may enforce the judgment in any other manner allowed by law) in the event that Defendant defaults on his payments. A default is defined as Defendant's failure to pay the full installment by the 15th day of the month.
- The Defendant's restitution debt does not survive the Defendant's death.
- The Court denies the United States' request that if Defendant sells or refinances property the proceeds apply to the restitution balance.
- The Court also DENIES the United States' October 1, 2001 Motion for Leave to File Motion for Reconsideration of Interlocutory Order Adopting Magistrate Judge's Report and Recommendation.

To the extent there is further need for judicial review of any execution proceedings in this matter, these shall be presided over by Magistrate Judge Seeborg pursuant to 28 U.S.C. § 3008.

IT IS SO ORDERED.

DATED: October 17, 2001 /s/ Spencer Williams
SPENCER WILLIAMS
United States
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RONALD JOHN GIANELLI, Defendant.	CR 86-20083-02 SW ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION (Filed Sep. 19, 2001)

The Court has reviewed the Report and Recommendation ("Report") prepared by Magistrate Judge Seeborg, filed on August 29, 2001, and the Objections of the parties filed on September 13, 2001. For the reasons set forth in the Report, this Court agrees that the United States is entitled to the issuance of the writ. At the same time, the Court agrees that in lieu of execution to obtain the full amount of restitution owed, it would be just to allow Defendant to pay his debt in monthly installments, including interest so as to provide the United States with the full value to which it is entitled. Accordingly, the Court hereby ADOPTS the Magistrate's Report. The writ of execution shall issue on October 1, 2001 unless Defendant is willing to agree to the following installment payment plan:

- Defendant shall make monthly payments to the United States of $1,510 plus interest, or $1,682.[1]
- The monthly payments are payable from June 1, 2001 to May 1, 2007, consistent with the applicable 20-year limitations period.
- The June 1, 2001 to November 1, 2001 payments are due in one lump sum of $10,092 on November 1, 2001.
- All payments thereafter are due on the first of the month.
- The United States retains the right to apply for a writ of execution (or may enforce the judgment in any other manner allowed by law) in the event that Defendant defaults on his payments. A default is defined as Defendant's failure to pay the full installment by the 15th day of the month.
- The Defendant's restitution debt does not survive the Defendant's death.
- The Court denies the United States' request that if Defendant sells or refinances property the proceeds apply to the restitution balance.

If Defendant is willing to agree to this plan, he or his counsel shall so state in a letter filed and served no later than September 28, 2001.

To the extent there is further need for judicial review of any execution proceedings in this matter,

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[1] The applicable interest rate is 3.78%. *See* Declaration of Gwendolyn Roberts, filed September 14, 2001.

these shall be presided over by Magistrate Judge Seeborg pursuant to 28 U.S.C. § 3008.

IT IS SO ORDERED.

DATED: September 19, 2001 /s/ Spencer Williams
SPENCER WILLIAMS
United States
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RONALD JOHN GIANELLI, Defendant.	Case No. CR 86-20083-02 SW (RS) REPORT AND RECOMMENDATION ON PLAINTIFF'S APPLICATION FOR A WRIT OF EXECUTION (Original Filed Aug. 29, 2001) [Docket no. 74]

This Report and Recommendation is submitted to the Honorable Spencer Williams, Senior United States District Judge, by Magistrate Judge Richard Seeborg, pursuant to the provisions of 28 U.S.C. § 636 and Judge Williams' referral order dated May 4, 2001.

I. INTRODUCTION

On April 25, 2001, the United States submitted to the Court an application for a writ of execution on the Tuolumne County property belonging to Defendant Ronald John Gianelli. In its application, the United States stated that a substantial change in Defendant's financial circumstances justified the issuance of the same writ that Judge Williams had in effect denied on October 4, 2000 as a result of

granting Defendant's motion to quash. On May 4, 2001, Judge Williams referred the matter to this Court pursuant to 28 U.S.C. § 3008. On May 18, 2001, this Court issued on the United States an Order to Show Cause Why the Writ Should Issue in light of the existence of a 1991 Installment Payment Agreement. A hearing on the matter was conducted on August 15, 2001.

II. BACKGROUND

After pleading guilty to mail fraud, Defendant was sentenced by the District Court on May 13, 1987 to six months in prison, four and one-half years probation, and $125,000 in restitution. While on probation, Defendant signed, on October 29, 1991, an Installment Payment Agreement, also known as the "Probation Agreement," providing that as long as he paid $100 monthly installments, the government would forebear from execution or enforcement. The Agreement is signed by Mr. Gianelli and is witnessed by Rosemary Costa, presumably a Probation Officer. The copy of the Probation Agreement provided to the Court contains a signature line for the U.S. Attorney, but the copy is neither signed by the U.S. Attorney, nor does the United States concede that it was ever signed or agreed to by that office.

After considering Defendant's motion to quash the original writ of execution on the Tuolumne County property, Judge Williams, concerned that the United States had not shown why it no longer

remained bound by the terms of the Probation Agreement, and finding that Defendant had kept up his monthly payments over the years, granted Defendant's motion. The Court also stated:

> In the course of arguing this motion, the government has noted that Defendant now possesses the financial ability to pay much more than the $100 monthly payment. Because this appears to be correct, the Court urges the parties to re-negotiate the payment schedule on their own. If such negotiations are not successful the government retains the ability to seek a writ of execution on the grounds that Defendant's change in financial circumstances justifies such an action. The government sought the writ of execution at issue in this motion based on Defendant's failure to maintain his payments, not his change in financial circumstances. Because the Court does not find a failure to make payments, the present motion to quash is granted.[1]

The United States now presents information resulting from its discovery efforts showing Defendant has the ability to pay the approximately $108,200 balance of restitution owed. According to the government, Mr. Gianelli's assets include:

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[1] Final Order Granting Defendant's Motion to Quash Writ of Execution, dated October 4, 2000 at 4:21-26, 5:1-6.

- The Tuolumne County property, including a house on 52 acres, valued at $255,000 with a lien of approximately $3,500. (Defendant believes it is valued at $450,000 to $500,000.)
- A Pleasanton residence co-owned with his spouse at an assessed value of $376,000 with lien of $98,000. (Defendant states the liens are in excess of $200,000.)
- Three income-producing properties in Palo Alto and San Mateo. (Defendant states he owns 1/6 co-tenancy with relatives and says his share of the rent is less than $10,000 per year.)
- Vehicles co-owned with Defendant's spouse.
- 7,000 shares of Jones Soda Company stock. (Defendant contends he sold the stock, at a loss, for $2,000.)
- Shares of San Francisco Flower Grower's Association. (Defendant asserts it was a nominal share received from his father.)
- A $55,333 cash inheritance from Defendant's mother in 1996. (Defendant alleges he spent the inheritance on the Tuolumne property improvements.)
- Putnum mutual funds of approximately $130,000. (Defendant asserts the account belongs to his father, and his name appears as co-owner so he can pay his father's bills.)
- Franklin California Tax-Free Income Fund of approximately $60,000. (Same.)

- A certificate of deposit with Wells Fargo Bank in an unknown amount. (Same.)
- A 1997 BMW vehicle registered to Ron and Delores Gianelli. (Defendant argues the car belongs to his son and was purchased by his father. Defendant further argues that the title is listed under his name for insurance purposes.)

Accordingly, even under Defendant's calculations, he has sufficient assets with which to satisfy the amount of restitution remaining.

As an alternative to execution on the Tuolumne property, the United States has proposed a repayment schedule of approximately $1,510 per month, a schedule which would allow Defendant to pay off the balance within six years, the time the United States argues remains in which to collect the judgment. Defendant objects, asserting that the Probation Agreement constitutes an "accord by partial performance which extinguishes the obligation of immediate payment." He would not agree to the $1,510 monthly payments, but proposed an increase to $800 per month, with an assignment of his "potential" inheritance from his father's estate.

III. LEGAL STANDARD

"[T]he amount of restitution ordered must be judicially established." *United States v. Angelica,* 859 F.2d 1390, 1395 (9th Cir.1988). This responsibility for determining the amount of restitution lies squarely with the district court, and a district court may not

delegate to a probation officer the determination of the amount of restitution owed. *See United States v. Mikaelian,* 168 F.3d 380, 391 (9th Cir. 1999); *United States v. Barany,* 884 F.2d 1255, 1260 (9th Cir. 1989). In the Ninth Circuit, however, a district court may delegate to the Probation Department the timing and manner of payments of court-ordered restitution. *See Barany,* 884 F.2d at 1259-60; *United States v. Signori,* 844 F.2d 635, 642 (9th Cir. 1988). Judge Williams did not make such a delegation in the current matter.

Prior to November 1, 1987, a district court could order restitution under either of two federal statutes, the Federal Probation Act, 18 U.S.C. § 3651, or the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3579, 3580 (1982 ed.). Effective November 1, 1987, the Sentencing Reform Act of 1984 repealed the restitution provision of the Federal Probation Act and renumbered the restitution sections of the VWPA. The VWPA, the general restitution statute, is now found at 18 U.S.C. §§ 3663-3664. It authorizes the district courts to order restitution to the victims of any crime under Title 18 of the United States Code. 18 U.S.C. § 3663(a)(1).

IV. DISCUSSION

A. Statute of Limitations

At oral argument, Defendant suggested that a ten-year state statute of limitation bars the United States from collecting the balance of the restitution debt. Following oral argument, this Court reviewed

the briefing filed prior to Judge Williams' June 7, 2000 hearing concerning the applicable limitations period. As explained below, the limitations period in effect at the time of Defendant's sentencing in 1987 is identical to the period specified in the current statute: 20 years. Defendant argues that applying this limitations period to pre-1987 criminal conduct violates the *ex post facto* clause of the Constitution. This Court disagrees, and finds that the government possesses the authority to collect Defendant's restitution debt through May 13, 2007, 20 years from the sentencing date.

1. As Now, a 20-Year Statute of Limitation Was in Effect at the Time of Sentencing

The VWPA currently supplies a 20-year limitations period. *See* 18 U.S.C. § 3664(m)(1)(A)(I) (providing that a restitution order can be enforced in the same manner as a fine); 18 U.S.C. § 3613(b) (providing a 20-year limitations period for the collection of fines). Under the version of 18 U.S.C. § 3579(h) in effect in May 1987, an order of restitution could be enforced by the United States in the manner provided for the collection of fines and penalties set forth in 18 U.S.C. § 3565. This provision of 18 U.S.C. § 3579(h) was added by Public Law 99-646, enacted November 10, 1986. The amendment took effect on the 30th day after enactment, or December 10, 1986. Section 3565, as amended on October 30, 1984, provided that the obligation to pay a fine or penalty ceases upon the

death of the Defendant or the expiration of 20 years after the date of the entry of the judgment, and that the defendant and the Attorney General could agree in writing to extend the 20-year period. 18 U.S.C. § 3565(h) (1984 ed.). Accordingly, in May 1987 the VWPA, at 18 U.S.C. § 3579, incorporated by reference a 20-year limitations period.[2]

2. Prior to December 10, 1986, No Limitations Period Was Specified by Federal Law

In 1983, the time of Defendant's criminal offense, 18 U.S.C. § 3579 did not contain a limitations period. Rather, it simply specified that an order of restitution may be enforced by the United States in the same manner as a judgment in a civil action. *See* 18 U.S.C. § 3579(h) (1982 ed.) ("An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same

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[2] The Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. § 3001 *et seq.*, was enacted in 1991 and was made retroactive 10 years. 28 U.S.C. § 3005. The FDCPA applies not to all restitution orders, but only to those owing to the United States. *See U.S. v. Bongiorno*, 110 F.3d 132 (1st Cir. 1997). In the present case, the debt is owing to the United States. The FDCPA does not provide a statute of limitation for enforcement of debts; it contains only a six-year limitations period for making a claim with respect to a fraudulent transfer or obligation. *See* 28 U.S.C. § 3306(b). Assuming the FDCPA applies to this collection effort, the limitations period would have to be found in the VWPA.

manner as a judgment in a civil action."). No limitations period was specified or incorporated by reference. Similarly, the 1983 version of section 3565, governing fines and penalties, did not set forth a limitations period.

In the absence of a federal statute specifying a limitations period, Federal Rule of Civil Procedure 69(a) directs that procedures on execution "shall be in accordance with the practice and procedure of the state in which the district court is held. . . ." Fed. R. Civ. P. 69(a).[3] Therefore, at the time of Defendant's offense, because no federal statute provided a limitation period for the collection of restitution, the 10-year state law statute of limitation of California Code of Civil Procedure 683.020 governed. This Court, however, does not agree with Defendant that applying a post-offense limitations period of 20 years violates the *ex post facto* clause of the Constitution, Article I, § 10.

3. *Ex Post Facto* Clause

"To fall within the *ex post facto* prohibition, a law must be retrospective – that is it must apply to events occurring before its enactment – and it must disadvantage the offender affected by it, by altering the

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[3] In 1983, there was a five-year savings period for the prosecution of crimes, 18 U.S.C. § 3282 (1982 ed.), but it is unclear if this would apply to collection of fines, penalties, or restitution.

definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (internal quotations and citations omitted). The offender is "disadvantaged" where the criminal law is changed "in a way that made punishment for crimes more onerous for a defendant." *United States v. Chea*, 231 F.3d 531, 539 (9th Cir. 2000) (internal quotations omitted). The measure of punishment prescribed by the later statute must be more severe than that of the earlier statute. *See California Department of Corrections v. Morales*, 514 U.S. 499, 505 (1995).

The Ninth Circuit has held that retroactive application of the restitution statute violates the *ex post facto* clause where the post-offense amendment causes a substantive change in punishment to the offender's detriment. *See United States v. Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997). In *Baggett*, the court noted that the post-offense amendments at issue "had the potential to increase the amount of restitution [the defendants] would have to pay, from an amount set by the court by taking into account appellants' financial circumstances, to full restitution." *Id.* The present case is distinguishable because it involves not a potential increase in the sum Defendant is obliged to pay, but an extension of the period for collection. The implementation of a 20-year limitations period does not increase the amount of the restitution or otherwise make Defendant's

punishment for his crime more onerous.[4] In fact, in the present case, the extension of the limitations period resulted in Defendant having the luxury of the equivalent of an interest-free loan from the government, while allowing him additional time to enjoy his property prior to the attempt at full collection. In addition, the government is not attempting to revive a claim that had already been extinguished pursuant to the 10-year limitations period: the 1986 extension of the limitations period to 20 years occurred well within ten years of Defendant's criminal activity in 1983. *See Clements v. United States,* 266 F.2d 397, 399 n.4 (9th Cir. 1959) (suggesting that prosecution under a statute which purports to revive a limitations period after it has run would violate the *ex post facto* clause).

The *ex post facto* clause is not violated if a procedural change does not alter "'substantial personal rights', but merely changes 'modes of procedure which do not affect matters of substance.'" *United States v. Lyndell N.,* 124 F.3d 1170, 1172 (9th Cir. 1997)

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[4] It is worth noting that the Circuit courts are in disagreement about whether restitution should be characterized as "punishment" for the purposes of invoking the *ex post facto* prohibition. *See U.S. v. Newman,* 144 F.3d 531, 539 & n.7 (7th Cir. 1998) (discussing cases); *United States v. Nichols,* 169 F.3d 1255, 1279-80 (10th Cir.), *cert. denied,* 120 S.Ct. 336 (1999). *Baggett* has been criticized, even within the Ninth Circuit, for assuming without reasoning that restitution is a form of punishment. *See Newman,* 144 F.3d at 539 n.7; *United States v. Jackson,* 189 F.3d 820, 824 n.4 (9th Cir. 1999).

(citations omitted); *see also Morales,* 514 U.S. at 505. The imposition of a 20-year statute of limitations is procedural in nature, and its implementation does not alter any substantial personal rights of Mr. Gianelli.[5] In sum, this Court agrees with the United States that a 20-year limitations period applies, and that its ability to collect remains intact through May 13, 2007.

B. Writ of Execution

At the time of Defendant's offense and sentencing, an order of restitution was payable immediately if a court did not order payments in specified installments. *See* 18 U.S.C. § 3579(f)(3) (1982 ed.) ("If not otherwise provided by the court under this subsection, restitution shall be made immediately."). Because Judge Williams did not order payments in installments, the restitution was due immediately. Mr. Gianelli argues that because of the existence of the Installment Payment Agreement, the state law doctrine of "accord by partial performance" relieves him of the obligation immediately to satisfy his debt. However, there is no authority showing that this

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[5] The conclusion that the statute of limitations effects a procedural, and not substantive, change is bolstered by the fact the Ninth Circuit has held that an extension of a statute of limitations for the prosecution of a crime does not violate the *ex post facto* clause, so long as the act was defined as criminal at the time of commission. *See Clements v. United States,* 266 F.2d 397, 399 (9th Cir. 1959).

state law doctrine binds federal judges determining how to effectuate a criminal restitution order. In addition, a defendant has the burden to prove he lacks the ability to pay a restitution debt. *See United States v. Adams*, 214 F.3d 724, 730 (6th Cir. 2000). Mr. Gianelli has not provided proof that he lacks the ability to satisfy the judgment. The assets located by the United States are more than sufficient to satisfy the debt. Accordingly, the United States has shown that, absent immediate payment by Mr. Gianelli, it has the power to collect on this judgment and is entitled to the issuance of the writ.

However, from the standpoint of equity there appears to be some merit to Mr. Gianelli's position. Since the Probation Office acted as the collection agent on behalf of the victim, and the government maintained a 14-year practice of mailing monthly payment vouchers to Mr. Gianelli for his remittance of monthly installment payments, there appears to have been an implied expectation by both parties that this restitution debt would be repaid in installments. Therefore, it is appropriate to require the collection of the balance of the debt under a monthly payment schedule spread over six years as the United States had recommended following the issuance of Judge Williams' October 4, 2000 order.[6]

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[6] The government asserts that if the application for the writ of execution is denied and installment payments allowed instead, interest payments should be added to Defendant's $108,200 principal. Because the United States is entitled to

(Continued on following page)

V. RECOMMENDATION

IT IS RECOMMENDED to the District Court that it adopt the United States's recommendation of increased monthly payments of $1,510 per month, plus interest, from June 2001 through May 2007 to satisfy the outstanding judgment within the 20-year statutory period. This Court will refrain from taking action on the application for the writ of execution pending further order of the Court.

DATED: August 29, 2001 /s/ "Richard Seeborg"
RICHARD SEEBORG
United States
Magistrate Judge

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immediate issuance of the writ, this Court agrees, and recommends that the final order from Judge Williams calculate interest into the monthly payment schedule.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD J. GIANELLI, Defendant-Appellant.	No. 07-10233 D.C. No. Cr-86-20083-RMW Northern District of California, San Jose ORDER (Filed Oct. 31, 2008)

Before: CANBY, THOMPSON and M. SMITH, Circuit Judges.

Judges Canby, Thompson, and M. Smith have voted to deny the petition for panel rehearing. Judge M. Smith has voted to deny the petition for rehearing en banc, and Judges Canby and Thompson so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.